APPEAL NO. 92155

On March 25, 1992, a contested case hearing was held in city), Texas, with (hearing officer) presiding as the hearing officer. The issue to be resolved at the hearing was whether the claimant, (claimant), appellant herein, was an employee of (hereafter "N Company") when he fell off a ladder injuring his back and left knee on (date of injury). The hearing officer concluded that appellant was not an employee of N Company, but was an employee of TS, an independent contractor, and that N Company had not assumed responsibility for securing workers' compensation insurance coverage for the independent contractor or his employees. The hearing officer decided that Hartford Accident and Indemnity Company, respondent herein, who was N Company's workers' compensation insurance carrier on (date of injury), is not liable for payment of benefits to appellant for his injury of (date of injury), under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant requests that we reverse the hearing officer's decision and render a new decision, or, in the alternative, reverse and remand for another hearing on the ground that the hearing officer erred in making several findings of facts and conclusions of law. Respondent asserts that the hearing officer's findings and conclusions are supported by the evidence, and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Appellant claimed he injured his back and left knee on (date of injury), when he fell from a ladder while scraping and painting a soffit on Mrs. N's house. Appellant's position is that he was working as an employee of N Company at the time of his injury, and, therefore, respondent is liable to him for workers' compensation benefits. Respondent's position is that appellant was not an employee of N Company at the time of his injury, but was rather an independent contractor or was employed by his brother, (hereafter "TS"), who was an independent contractor operating under the name of (hereafter "S Contractors"). A written independent contractor agreement was not in evidence and none was alleged to be in existence.

(hereafter "SB"), respondent's only witness, testified as follows: He is the supervisor and sole employee of N Company whose business is home repair and painting. TS represented to him that he was the principal of S Contractors and submitted bids on 10 or 12 N Company painting and repair jobs, including work on the N house in May 1991. S Contractors was hired as the subcontractor on those jobs over another subcontractor. TS's bid on Mrs. N's 4,000 square foot house was $400 to paint the inside and $600 to paint the outside. TS said he could do the job in one week, but it took three weeks. SB chose TS to do that job over another subcontractor's bid because TS's bid was lower and because of his promise to complete the job in one week. TS gave SB an S Contractors' bank account deposit slip for SB to deposit payment for work done on Mrs. N's house. SB always paid

TS, and TS was responsible for paying his own employees, including appellant. No deductions for taxes, benefits, or workers' compensation premiums were made from payments to TS. N Company sent TS a 1099 form for payments made to him during 1991. It was up to TS to send 1099 forms to his employees. There was no agreement for SB to deduct any amount for workers' compensation insurance. N Company did not provide workers' compensation insurance for any of its subcontractors, but carried workers' compensation insurance and general liability insurance for the purpose of being able to bid on jobs as general contractor. SB told TS that "We have workmen's comp and liability insurance," but did not represent that TS or appellant were covered by such insurance. TS was free to hire others to help him with the jobs he worked on for N Company. SB didn't tell TS who to hire, how many employees to hire, or how much to pay them. When the work on Mrs. N's house got behind schedule, SB told TS to "[g]et some more people and get in there and get this thing done." TS then hired DO. SB could not fire DO or appellant since they were TS's employees. SB didn't set the time for TS and his employees to start work at Mrs. N's house, but asked them to get there and work a full day. TS and his employees, including appellant, started work at a different time every day and left work at different times. SB didn't care so long as they got the job done. N Company supplied the paint for Mrs. N's house, and S Contractors supplied all the tools and supplies to be used on that job. TS and appellant were free to work for other contractors while working N Company jobs, and had done a job for another contractor while working on Mrs. N's house. SB understood he was to take directions from the caretaker of the house, R M, when Mrs. N was away. On several occasions the caretaker showed him some of the work which the caretaker thought had not been done right so SB left written notes for TS describing these things. One such note was in evidence. SB had to go to Mrs. N's house every other day to act as a "babysitter" because "the work quality was not getting done and the schedule was not being met." He visited that job site to ensure the job was being done properly and in accordance with the agreement he had with the owner. SB was not at the job site on May 23rd when appellant fell from the ladder, and did not request or direct appellant to climb the ladder. He was notified of the accident on May 27th after he paid TS with a cashier's check. He didn't tell appellant he was an employee of N Company, nor did he consider appellant, TS, or D O to be employees of N Company. Appellant never filled out a job application to work for N Company. The only thing SB ever directly asked appellant to do was help him hang a chandelier at Mrs. N's house. When appellant reported the accident, SB told appellant that N Company had workers' compensation, but that he, appellant, was an employee of TS. SB acknowledged that he did not pay TS in full on the completion of each job because SB was having trouble collecting payments from the homeowners. No written bids or contracts were in evidence. However, an invoice from S Contractors to SB and N Company for a job done in March 1991 at a location other than Mrs. N's house was in evidence.

TS testified as follows: Before working for N Company he had worked as a general contractor under the name of S Contractors and appellant had been his employee. S Contractors was a "make ready" service. When operating S Contractors he carried workers' compensation insurance and general liability insurance. After being "laid off" in February 1991 by the company that had hired him as a general contractor, he and appellant

called SB to seek work. TS thought SB was the owner of N Company. SB told them he would put them to work and that TS wouldn't need workers' compensation insurance or general liability insurance because TS "was covered under his," and that he, SB, "would cover that." TS stopped carrying his own workers' compensation insurance after being told that, but continued to carry general liability insurance until he could no longer afford it. TS did not fill out an employment application to work for N Company. From March to September 1991, TS did about 30 "jobs" for SB. He did not submit bids on those jobs nor were written contracts entered into. SB told TS what he would pay for each job and TS accepted that amount because it was "fair." There was no negotiation as to the price to be paid. In only one instance did TS submit an invoice to N Company after completion of a job. That invoice was for a job done in March 1991, a copy of which was in evidence. TS and appellant were supposed to be paid weekly, but were rarely ever paid, and when paid, it was often with a bad check. Full payment was not made after each job. Sometimes they were paid with cash and sometimes with a check. Checks were drawn on SB's personal account and N Company's account. All checks were made payable to TS alone. None were made payable to appellant or S Contractors. N Company did not provide benefits such as sick leave, vacation, or a retirement plan to TS and appellant. No deductions for taxes or anything else were made from payments made to TS. On the first job that TS and appellant did for N Company, SB told TS to get more help so TS hired D O on behalf of SB. On that first job, SB paid D O directly. On jobs after that, including the N job, TS paid D O from the payments he received from N Company, and then would split the remaining amount with appellant. TS had a bank account for S Contractors before working for N Company and while working for N Company. He used it as his personal account. Except for one occasion, SB always provided all the materials to do a job. In May 1991, TS, appellant, and D O removed wallpaper, textured the walls, and painted the inside and outside of Mrs. N's house. TS did not submit a bid to N Company for that job. SB told him how much he would pay for that job and TS agreed to that amount. SB told them to be at Mrs. N's house every day by 9:00 a.m. Sometimes they arrived by 9:00 a.m. and sometimes by noon. They always worked until at least 5:30 p.m. N Company provided the paint, texture material, thinner, sandpaper, and roller pads for the job. TS supplied the spray gun, paintbrushes, and a ladder for the job. It took two weeks to complete the work on Mrs. N's house. SB was at the job site every day except Saturdays. SB was always there telling them what to do and how to do it. He also left two notes telling them what to do. For example, SB told them to paint the inside of the house first. Also, after telling them to paint the walls all one color, he told them to redo the woodwork in a different color. TS felt he took a "loss" on the N job because SB didn't pay them any more for redoing the painting. Final payment for the N job was in the form of a cashier's check which SB made payable to TS. TS paid D O and split the remainder with appellant. The ladder that appellant fell off of belonged to TS. TS did not direct appellant to paint the soffit or to use the ladder. Appellant was just doing his job when he fell off the ladder. TS felt he was required to show up at SB's office every day, and, if there was no work for him he would not look for another job but would go home. He kept track of how much SB owed them on paper and would present that "personal accounting" to SB from time to time. TS gave appellant a 1099 form for 1991 but it was said not to include payments from SB or N Company. TS agreed that it

was possible that he may have identified his business as S Contractors while working for N Company. TS felt he could not have fired appellant because appellant worked for SB. However, he thought both he and SB could fire D O. TS denied doing work for others while working for N Company. TS said he would have kept his workers' compensation insurance if he had been working as a contractor for N Company, but since he was an employee of N Company he didn't need it. He believed he and appellant were working for N Company as employees and not as contractors because of the amount of control exercised over them and the way in which they were paid. He acknowledged that he did not have a written agreement with N Company whereby N Company agreed to provide him with workers' compensation insurance.

Appellant testified that he had worked for TS since 1989 doing painting and repair work, but that he and TS were hired by SB to work as employees of N Company and that SB told them they were covered by his workers' compensation insurance. He said he and TS were supposed to be paid by SB at the completion of a job but all they got was a "little bit here and there." He was never paid directly by SB or N Company. TS would be paid and then TS would pay him. There were no deductions from the amounts paid TS or him. They were paid by the job and not hourly. He and TS worked for one other person who was a close friend that needed help in completing a job between doing jobs for N Company. They did not work for anyone other than N Company while working on the N house. On the N job, appellant said he was just "working together" with TS and D O, and was not working for TS. He said that the N job consisted of removing wallpaper, texturing walls, interior painting, scraping and painting the exterior of the house, and making a few repairs. He testified that every day or every other day SB would go to the N job to supervise or check on their work. SB supplied the materials and some of the equipment for that job, and TS and appellant took some of their own supplies and equipment to the job. Appellant said SB was not at the job site on the day he was injured. He also said that neither TS nor SB told him to put the ladder on the deck to paint the soffit or to climb the ladder. He put the ladder where he did because it was the easiest way to get up on the house. When TS got paid for the N job, TS paid D O and then TS and appellant "split the profit." When appellant reported his accident to SB, SB told him he was covered by workers' compensation. Appellant felt that TS could not have fired him from the N job, but that SB could have done so.

Appellant introduced three affidavits into evidence. D O stated in his affidavit that SB supervised the work on a daily basis at the job where appellant was injured; that SB made them redo parts of the house to his satisfaction; that SB left notes giving detailed instructions on how he wanted the job done; that SB told them what time to start work; that it was understood they were not to work for others while working for SB; and that it was his understanding that SB would provide workers' compensation insurance. R M, the caretaker of the N house, stated that every other day SB would bring materials and supervise the job; that SB made the workers repaint the interiors; that SB made the workers scrape and sand the woodwork before painting; and that the workers had to be on the job by 9:00 a.m. and had to work late. J R stated that he worked for SB at N Company and

that it was his understanding that N Company carried workers' compensation insurance. He also said that SB specified what was to be done at each job site and usually paid for the materials.

The note from SB to TS concerning the N job refers to latex enamel peeling off windows, sanding out "nicks and "dings" before oil is put on, and points out that the "prep" work is more important than the paint.

Appellant challenges Findings of Facts 5, 7, 8, 9, 12, and 15, and Conclusions of Law 4, 5, 6, 8, and 9. The key conclusions are that appellant was an employee of TS, an independent contractor, as defined in Article 8308-3.06(b)(2), and was not an employee of N Company, as defined in Article 8308-1.03(18), and that N Company did not assume responsibility for securing workers' compensation insurance coverage for TS or his employees under Article 8308-3.23(b). In considering a challenge to the sufficiency of the evidence, we recognize that the function of the hearing officer, as the trier of fact, is to judge the credibility of the witnesses, assign the weight to be given their testimony, and resolve any conflicts or inconsistencies in the testimony. Article 8308-6.34(e); Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). When presented with conflicting testimony, as in this case, the trier of fact may believe one witness and disbelieve others. R. J. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1987). We do not substitute our judgment for that of the hearing officer if the challenged finding is supported by some evidence of probative value and is not against the great weight and preponderance of the evidence. Alcantara, *supra*; Texas Workers' Compensation Commission Appeal No. 92156 (Docket No. HO-92059648-01-CC-HO41) decided June 1, 1992. Applying these standards of review, we conclude that the challenged findings and conclusions are supported by some evidence of probative value and are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

Although the hearing officer's application of Article 8308-3.06 to the contractor and workers in this case was not raised as an issue on appeal, we are of the opinion that appellant's testimony that painting and repair work was done on the N house, a residential structure, provided a sufficient basis for the application of that article. Article 8308-3.06(b)(2) defines an "independent contractor" as a person who contracts to perform work or provide a service for the benefit of another and who: (A) is paid by the job, not by the hour or some other time-measured basis; (B) is free to hire as many helpers as he desires and to determine what each helper will be paid; and (C) is free to work for other contractors, or to send helpers to work for other contractors, while under contract to the hiring contractor. The hearing officer concluded that TS was an independent contractor because each element of Article 8308-3.06(b)(2) had been met. That TS was paid by the job was supported by the testimony of SB and appellant. The evidence was conflicting as to whether TS was free to hire helpers and work for other contractors; however, SB's testimony constituted some evidence of probative value on those matters, and some of his testimony on those matters was corroborated by the testimony of TS and appellant, especially in

regard to TS's hiring of D O, and working for another contractor between jobs for N Company. We have previously applied the independent contractor provisions of Article 8308-3.06 in determining that a claimant was an employee of an independent contractor and that the hiring contractor was not responsible for providing workers' compensation to the independent contractor's employee in the absence of a written agreement provided for under Article 8308-3.06(d). See Texas Workers' Compensation Commission Appeal No. 91005 (Docket No. AU-00003-91-CC-4) decided August 14, 1991; Texas Workers' Compensation Commission Appeal No. 91087 (Docket No. AU-00054-91-CC-1) decided January 16, 1992. We conclude that there was sufficient evidence of record to support the hearing officer's determination that appellant was not an employee of N Company, but rather was an employee of TS, an independent contractor.

Pursuant to Article 8308-3.06(c) and (d), a hiring contractor has no obligation to provide workers' compensation insurance for an independent contractor or to an independent contractor's employee, helper, or subcontractor absent a written agreement whereby the independent contractor agrees that the hiring contractor may withhold the cost of workers' compensation insurance from the contract price and that, for the purpose of providing workers' compensation insurance, the hiring contractor will be the employer of the independent contractor and the independent contractor's employees. Absent such an agreement, an independent contractor is responsible for any workers' compensation insurance coverage provided to the employees of that independent contractor. The testimony of SB an TS established that there was no such written agreement.

Article 8308-3.06(g) provides in part that a hiring contractor shall not be considered to have exerted employer-like controls over an independent contractor or an independent contractor's employee by reason of (1) controlling the hours of labor if such control is exercised solely for the purposes of: (A) establishing the deadline for completion of the work called for by the contract; (B) scheduling work to occur in a logical sequence and to avoid delays . . ., or (2) stopping or directing work solely for the purpose of: (B) controlling work solely for the purpose of ensuring that the end product is in conformity with the contracted for result. Under Texas case law, the test for determining whether one is an employee or an independent contractor is the existence of the right to control the details of that person's work. Newspapers, Inc. v. Love, 380 S.W.2d 582, 590. (Tex. 1964). Where no contract between the parties establishes the status of the worker or the employer's right to control his work, an employee-employer relationship may be established circumstantially by evidence of actual exercise of control. Anchor Casualty Co. v. Hartsfield, 390 S.W.2d 469, 471 (Tex. 1965). If, after considering evidentiary factors bearing on one party's right to control the details of another's work, there is conflicting evidence as to the status of the worker, the issue is for the trier of fact. Eagle Trucking Co. v. Texas Bitulithic Co., 590 S.W.2d 200, 212 (Tex. Civ. App.-Tyler 1979), *aff'd in part and rev'd in part on other grounds*, 612 S.W.2d 503 (Tex. 1981). The general type of supervision which any general contractor must have over his subcontractor in order to see that the work is done in accordance with the plans and in a good and workmanlike manner does not constitute evidence of an employer-employee relationship. United States Fidelity & Guaranty Company v. Goodson,

568 S.W.2d 433 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91078, *supra*. In this case, the hearing officer had the responsibility to resolve conflicting evidence on the status of TS and appellant, and their relationship with SB and N Company. In our opinion, the hearing officer's conclusion that the controls exerted by N Company over TS and his employees were not employer-like controls in that such controls came within the purview of the above enumerated provisions of Article 8308-3.06(g)(1) and (2) is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

We find the case cited by appellant, INA of Texas v. Torres, 808 S.W.2d 291 (Tex. App.-Houston [1st Dist.] 1991, no writ), not to be dispositive on the issue of whether appellant was an employee of N Company. First, the Torres case was not decided under the independent contractor provisions of Article 8308-3.06. Second, in that case, the court found that contradictory inferences and conclusions could be drawn from the facts presented, including the facts that the worker's alleged employer did not deduct taxes or provide employee benefits, and, therefore, the jury was properly asked to determine the worker's employment status. The court concluded that the jury's finding that Torres was an employee was supported by sufficient evidence where there was extensive conflicting evidence on the employer-employee relationship and noted that the jury was the judge of the credibility and weight to be given the evidence. Likewise, in the instant case there was conflicting evidence on the employer-employee relationship and the trier of fact was the judge of the credibility of the witnesses and weight to be given the testimony.

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge